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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
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Implementation of Section 309(j) )  
of the Communications Act )  
 )  
Competitive Bidding )  
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PP Docket No. 93-253

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COMMENTS OF CENCALL COMMUNICATIONS CORPORATION

CenCall Communications Corporation ("CenCall"), by its attorneys and pursuant to the Commission's Notice in this proceeding,<sup>1</sup> hereby submits its comments regarding whether a system of competitive bidding should be used to license Specialized Mobile Radio ("SMR") systems in the 800 MHz bands.

**I. Introduction and Summary.**

CenCall is an operator and manager of SMR systems in the Rocky Mountain, Midwest and Pacific Northwest regions of the United States ("Operating Regions"). As such, CenCall has received wide-area license designations in its Operating Regions.

<sup>1</sup> In the Matter of Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Notice of Proposed Rulemaking, CC Docket No. 93-253 (Rel. October 12, 1993) ("Notice").

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The Omnibus Budget Reconciliation Act of 1993 added Section 309(j)<sup>2</sup> to the Communications Act, as amended.<sup>3</sup> Section 309(j) of the Communications Act gives the Commission authority to employ competitive bidding procedures to choose from among two or more mutually exclusive accepted applications for initial licenses.

In the Notice, the Commission seeks comment its various proposals to apply competitive bidding to SMR licenses. In particular, the Commission seeks comment on (1) whether wide-area SMR systems should be subject to competitive bidding; (2) whether the wide-area SMR systems proposed in PR Docket Nos. 93-133 and 89-553 should be subject to competitive bidding; and (3) specific preferential measures and auction methodologies for SMR systems, including the wide-area SMR systems proposed in PR Docket Nos. 93-133 and 89-553.<sup>4</sup>

**II. SMR Systems Should Not Be Subject To Competitive Bidding Unless They Involve Applications For Mutually Exclusive Initial Licenses.**

In the Notice, the Commission proposes to apply a system of competitive bidding to SMRs because "it is overwhelmingly likely that SMRs will provide service to subscribers for compensation."<sup>5</sup> The Notice also states that renewal licenses or permits are to be

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<sup>2</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, 107 Stat. 312, 392 (August 10, 1993) ("Budget Act").

<sup>3</sup> 47 U.S.C. §§ 151 et seq. ("Communications Act").

<sup>4</sup> See Notice at ¶¶ 136-141.

<sup>5</sup> Notice at ¶ 138.

excluded from the competitive bidding process, as are modifications to existing licenses.<sup>6</sup>

CenCall urges the Commission to recognize that Congress did not intend the sole criterion for application of the competitive bidding procedures to be whether service was provided to subscribers for compensation. Rather the Conference Agreement specifically states that [competitive bidding] "procedures will only be utilized when the Commission accepts for filing mutually exclusive applications for an initial license, and the Commission has determined that the principal use of that license will be to offer service in return for compensation from subscribers."<sup>7</sup>

Indeed, in adding Section 309(j)(1) to the Communications Act, Congress provided as follows:

(j) Use of Competitive Bidding. --

(1) General Authority. -- If mutually exclusive applications are accepted for filing for any initial license or construction permit that will involve a use of the electromagnetic spectrum . . . , then the Commission shall have the authority . . . to grant such license or permit to a qualified applicant through the use of a system of competitive bidding that meets the requirements of this subsection. (Emphasis added.)<sup>8</sup>

Thus, Congress has set up a three-prong test that must be met before the Commission is authorized to utilize competitive bidding procedures to grant spectrum licenses. First, the applications must be for an initial license. Second, they must be mutually exclusive. Third, the Commission must determine that

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<sup>6</sup> Notice at ¶ 22.

<sup>7</sup> H.R. Rep. No. 103-111, 103rd Cong., 1st Sess. (1993) ("Conference Report"), at 254.

<sup>8</sup> § 6002 of Budget Act.

the principal use of the license will be to offer service in return for compensation from subscribers. The Commission has no authority to utilize competitive bidding, then, unless the applications are for an initial license, are mutually exclusive, and are for the provision of commercial services to subscribers.

Under the Commission's rules, traditional SMR licenses have not been treated as mutually exclusive, but rather have been granted on a first-come, first-served basis.<sup>9</sup> In fact, even under the Commission's proposed licensing rules for future development of SMR systems,<sup>10</sup> traditional licenses for SMR systems will be granted on a first-come, first-served basis.<sup>11</sup> Thus, the "mutually exclusive" requirement for these applications would not be met under the current iterations of the rules and the proposed rules.

Furthermore, Congress specifically provided, when enacting Section 309(j)(6)(E) of the Communications Act as part of the Budget Act, that:

"[Nothing in this subsection, or in the use of competitive bidding, shall] be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings. (Emphasis Added)."<sup>12</sup>

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<sup>9</sup> 47 C.F.R. 90.611(b).

<sup>10</sup> In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, FCC 93-237, PR Docket No. 93-144 (Rel. June 9, 1993) ("Future Development Notice").

<sup>11</sup> Id. at ¶¶ 7, 20.

<sup>12</sup> § 6002 of the Budget Act.

Therefore, it is incumbent on the Commission to continue to employ any feasible methods to avoid mutual exclusivity.

CenCall submits that the Commission's proposed extension of the competitive bidding procedures to SMR licenses is not authorized by the Budget Act for any cases in which the applications for the initial licenses are not mutually exclusive. CenCall further submits that the Commission has not been directed by Congress to change existing rules to create a mutual exclusivity procedure for SMR licenses. Clearly, the result of this rulemaking should not be to mandate auctions where Congress specifically intended that they not apply.

**III. The Wide-area SMR Systems Proposed In PR Docket Nos. 93-133 and 89-553 Should Not Be Subject To Competitive Bidding In The Initial Round Of Licensing For Modifications To Already Licensed Channels.**

The Notice reaches a tentative conclusion that the wide-area SMR systems proposed in PR Docket Nos. 93-144 and 89-553 should be subject to competitive bidding under the same rationale that the Commission would apply to SMR systems in general.<sup>13</sup>

CenCall urges the Commission to recognize that the wide-area SMR systems proposed in PR Docket Nos. 93-144 and 89-553 are, at least in the initial round of licensing, not applications for initial licenses but rather are modifications of existing licenses that have been constructed and placed in operation. Thus, such applications should be treated as the modifications of existing licenses that they will be, rather than applications for initial licenses subject to competitive bidding.

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<sup>13</sup> Notice at n. 135.

In PR Docket Nos. 93-144 and 89-553, the Commission proposes to establish a new licensing approach to assigning 800 MHz SMR spectrum for wide-area use throughout wide service areas in the interest of spectrum efficiency, diversity of service and service to customers.<sup>14</sup> Under the new approach, a new type of 800 MHz wide-area license, entitled "Expanded Mobile Service Provider" ("EMSP"), would be assigned for "wide-area use throughout wide service areas."<sup>15</sup> The EMSP license would permit channels to be aggregated for operation of wide-area systems throughout each of the 47 Rand-McNally Major Trading Areas (MTAs), or, in the alternative, each of the 487 Rand-McNally Basic Trading Areas (BTAs) and Puerto Rico.<sup>16</sup> Initial eligibility for EMSP licenses would be restricted to those entities that are "licensees of 800 MHz SMR systems within the BTA/MTA on or before May 13, 1993, and seek to reuse throughout that area the SMR channels operating on stations that they have constructed and placed in operation as of the date that they apply for the EMSP license."<sup>17</sup> It is clear that EMSPs, then, are modifications to existing licenses since the EMSP applicant would already be licensed for the channels for which the applicant applies for EMSP designation.

The Commission, in its Notice, correctly notes that modifications to existing licenses are to be excluded from the

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<sup>14</sup> See Future Development Notice at ¶ 7.

<sup>15</sup> Id.

<sup>16</sup> Id.

<sup>17</sup> Id.

competitive bidding process.<sup>18</sup> In addition, the Commission has noted that most wide-area SMR applicants are already licensed on all of their channels within their already-designated wide-area footprints.<sup>19</sup> And, in the initial round of licensing, only those already-licensed channels will be eligible for EMSP licensing. As a result, all licenses granted in the first round of EMSP licensing will be mere modifications of existing channels that are already licensed, constructed and operational. The Commission's recognition of this fact can only lead to the conclusion that such EMSP licenses are not subject to competitive bidding.

**IV. In The Event That Competitive Bidding Is Adopted, It Should Apply Only On A Frequency By Frequency Basis And Only For Applications To Which Mutual Exclusivity Applies.**

CenCall has urged this Commission to recognize that the mutual exclusivity requirement in Section 309(j)(1) of the Communications Act requires the Commission to impose competitive bidding only for mutually exclusive applications for initial licenses. The Commission proposes to apply competitive bidding to all SMR systems, seemingly without regard to the fact that mutual exclusivity does not apply to traditional SMR systems as discussed above. If the Commission determines that, notwithstanding the mutual exclusivity requirement imposed by the statute, competitive bidding will apply to traditional SMR systems or the wide area systems proposed in PR Docket Nos. 93-

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<sup>18</sup> See text at n. 5, supra.

<sup>19</sup> Future Development Notice at ¶ 24.

133 and 89-533, the Commission should apply such competitive bidding only on a frequency by frequency basis and only for the individual contested frequencies associated with mutually exclusive applications. All frequencies which are not contested and are not subject to mutual exclusivity should be immediately granted to the applicant. Those frequencies that are subject to competitive bidding should be auctioned separately and should be either separately licensed or added to the previously granted license. To apply competitive bidding in any other manner, would unnecessarily delay licensing of uncontested frequencies and delay the provision of service to the public. Any other result would fail to meet the Congressional requirements that only mutually exclusive initial applications be subject to competitive bidding.

#### V. Conclusion.

The Commission has always been extremely concerned with the correctness of its actions, especially as they relate to the critical issues of proper allocation of spectrum for new or more efficient means of communications.<sup>20</sup> In the Budget Act, Congress expressly limited the Commission's Authority to impose competitive bidding procedures to mutually exclusive applications for initial licenses where the principal use of the license will be to offer service in return for compensation from subscribers. Traditional SMR systems, either as they exist at present or as

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<sup>20</sup> See, e.g., Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, 98 FCC 2d 175, 194-198 (1984).



contemplated in the Commission's Future Development Notice, do not involve mutual exclusivity. In addition, applications for the initial round EMSP licenses contemplated in the Future Development Notice are not for initial licenses but rather for modifications of existing licenses. Therefore, the Commission does not have the authority to impose competitive bidding in either of these situations. However, any bidding imposed on applicants for licenses in the SMR service must apply only on a frequency by frequency basis, to specific frequencies included in mutually exclusive applications. Such competitive bidding must not delay the Commission's licensing of uncontested frequencies.

Respectfully submitted,

CENCALL COMMUNICATIONS CORPORATION



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November 10, 1993